

2010

The Native American Graves Protection and Repatriation Act at Twenty: Reaching the Limits of Our National Consensus

Steven J. Gunn

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Gunn, Steven J. (2010) "The Native American Graves Protection and Repatriation Act at Twenty: Reaching the Limits of Our National Consensus," *William Mitchell Law Review*: Vol. 36: Iss. 2, Article 9.
Available at: <http://open.mitchellhamline.edu/wmlr/vol36/iss2/9>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT AT TWENTY: REACHING THE LIMITS OF OUR NATIONAL CONSENSUS

Steven J. Gunn[†]

I. INTRODUCTION.....	503
II. BACKGROUND	508
III. NAGPRA.....	512
A. <i>Repatriation of Cultural Items Held by Federal Agencies and Museums</i>	515
B. <i>Disposition of Cultural Items Found on Federal or Tribal Land</i>	519
C. <i>Trafficking</i>	520
IV. SUCCESSES.....	520
V. REMAINING CHALLENGES	523
A. <i>Unaffiliated Cultural Items</i>	524
B. <i>Newly-Discovered Cultural Items</i>	526
VI. CONCLUSION	531

I. INTRODUCTION

The Native American Graves Protection and Repatriation Act (NAGPRA), enacted on November 16, 1990,¹ provides far-reaching protections for the sacred objects, cultural patrimony, funerary

[†] Adjunct Professor of Law, Washington University School of Law; Attorney, Ryals & Breed, P.C., St. Louis, Missouri. J.D., 1995, Yale Law School, A.B., 1992, Stanford University. The author wishes to thank John Henry Merryman, the Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law, Emeritus, and Affiliated Professor in the Department of Art, Emeritus, at Stanford University and Charles R. McManis, the Thomas and Karole Green Professor of Law, Director of the Intellectual Property and Technology Law Program, and Director of the Center for Research on Innovation and Entrepreneurship at the Washington University School of Law, for their insightful comments on an earlier draft of this paper. The author also wishes to thank Daniel Leo Human for his excellent research assistance.

1. American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C. §§ 3001–3013 (2006), 18 U.S.C. § 1170 (2006)).

objects, and ancestral human remains of American Indians and Indian tribes. With few exceptions, the Act requires federally-funded museums and federal agencies to repatriate to Indians and Indian tribes any such items in their possession or control.² Among these items³ are works of great artistic and cultural value, including the thousand-year-old “exquisite black-on-white pottery” of the Mimbres people, “decorated with ingenious animal and human motifs;”⁴ the wampum belts of the Iroquois, on which the tribes of the confederacy recorded major historical events, treaties, and laws;⁵ and the spectacular headdresses of the plains Indians, made of buckskin and eagle feathers, buffalo fur and horns, among other materials. U.S. Senator Pete Domenici aptly described these and other items at the time of NAGPRA’s passage: “They are *more* than just interesting artifacts; they are works of art.”⁶

Many, if not most, of these items were stolen or seized from Indians during the last two centuries. They were looted from Indian villages, ceremonial grounds, massacre sites, battlefields, schools, and prisons; excavated from burial grounds and unmarked Indian graves; and otherwise misappropriated from Indians and their tribes.⁷

In addition to requiring the repatriation of native cultural items held by museums and agencies, NAGPRA prohibits the unauthorized excavation and removal of Indian artifacts, cultural property, and remains from federal or tribal lands;⁸ safeguards tribal ownership rights to any such property or remains discovered on federal or tribal lands;⁹ and prohibits trafficking in Indian artifacts and remains

2. 25 U.S.C. § 3005 (2006).

3. The terms “artifacts,” “cultural property,” and “Indian art” are used interchangeably in this paper. They are meant to refer to the cultural items listed in NAGPRA, with the exception of human remains. See 25 U.S.C. § 3001(3) (2006). These items include sacred objects, cultural patrimony, and funerary objects. *Id.* For definitions, see *infra* notes 60–68 and accompanying text.

4. ANDREW GULLIFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS 45 (2000).

5. Martin Sullivan, *A Museum Perspective on Repatriation: Issues and Opportunities*, 24 ARIZ. ST. L.J. 283, 285–86 (1992).

6. U.S. Sen. Pete Domenici (R-NM), *Preface B to PROTECTING THE PAST* v (George S. Smith & John E. Ehrenhard eds., 1991) (emphasis added).

7. Suzan Shown Harjo, *Introduction to MENDING THE CIRCLE: A NATIVE AMERICAN REPATRIATION GUIDE* 3, 4–6 (Barbara Meister ed., 1995). *Introduction available at* <http://www.repatriationfoundation.org/pdf/mending%20the%20circle/CoverBeginning.pdf>. See also *infra* notes 35–52 and accompanying text (discussing the misappropriation of American Indian artifacts and remains).

8. 25 U.S.C. § 3002 (2006).

9. *Id.*

obtained in violation of the Act.¹⁰

NAGPRA was the product of a national consensus concerning the dignity and respect due American Indians, their property, and their cultures.¹¹ This consensus affirmed that, whenever possible, objects of great religious or cultural importance to tribes ought to be returned to the tribes for contemporary ceremonial and cultural use, not held in museum collections.¹² It also affirmed that American Indians ought to be able to bury the remains of their ancestors in a respectful and culturally appropriate manner.¹³ Support for NAGPRA was widespread and included the endorsements of numerous major associations of museums, scientists, historical societies, and Indian tribes.¹⁴

Rennard Strickland, a legal historian of Osage and Cherokee heritage, describes NAGPRA's significance:

The act is important because it represents the new American consensus about sacred objects and cultural patrimony, a consensus not only of members of the Congress and of Native peoples, but also of very diverse groups of scientists, museum trustees, and art collectors. That consensus is: The sacred culture of Native Americans and Native Hawaiians is a living heritage. This culture is a vital part of the ongoing lifeways of the United States, and as such, must be respected, protected, and treated as a living spiritual entity—not as a remnant museum specimen.¹⁵

Many Indians consider sacred objects, cultural patrimony, and funerary objects to be vital to their survival as a people. Sacred objects, such as medicine bags and bundles, “possess life forces of

10. 25 U.S.C. § 3001(13) (2006); 18 U.S.C. § 1170(a) (2006).

11. See C. Timothy McKeown & Sherry Hutt, *In the Smaller Scope of Conscience: The Native American Graves Protection and Repatriation Act Twelve Years After*, 21 UCLA J. ENVT'L. L. & POL'Y 153, 154–56 (2002).

12. See *id.* at 153–57.

13. See *id.* at 155–56.

14. Among the Act's supporters were the American Association of Museums, Society for American Archaeology, Society for Historical Archaeology, Society of Professional Archaeologists, Archaeological Institute of America, American Anthropological Association, American Association of Physical Anthropologists, National Conference of State Historic Preservation Officers, National Trust for Historic Preservation, Preservation Action, Association on American Indian Affairs, Native American Rights Fund, and National Congress of American Indians. *Id.* at 154.

15. RENNARD STRICKLAND, TONTO'S REVENGE: REFLECTIONS ON AMERICAN INDIAN CULTURE AND POLICY 85–86 (1997).

their own.”¹⁶ They are the “prime backbone” for many tribes, helping assure their members that they will retain their Indian identities, cultures, and religions for generations to come.¹⁷ According to Janine Pease Windy Boy, President of Little Big Horn College and a Crow Indian:

There are some ceremonies that cannot happen unless certain medicine bundles are present and their power and personage is part of the community that undertakes the ceremony Now if the bundle is gone, then the function of that society is broken and the value that society brought, the relationships that it made among the people, the songs, the stories, the history, the cohesiveness of that group of people, the family nature of that society is broken, and that is a human tragedy.¹⁸

Other items, like the *Yei B'Chei* or ceremonial dance masks of the Navajo Nation, are considered “living gods.”¹⁹ The *Yei B'Chei* represent the “‘heartbeat’ of the Navajo people” and are referred to by tribal members not as masks, but as “gods.”²⁰ They are the property of the entire community and cannot be bought or sold by any individual.²¹

Despite the great importance of these items to Indian people, their aesthetic qualities and historic value have created great demand among non-Indian collectors and museums. Single pieces of Mimbres pottery have sold for up to \$75,000;²² collections of Navajo *Yei B'Chei* have drawn \$70,000;²³ and, in one case, an assortment of Tlingit ceremonial objects was valued at \$250,000.²⁴ It has been reported that “annual sales of Native American art at the auction houses of Christie’s and Sotheby’s peaked at \$10 million in 1998.”²⁵

In its first twenty years, NAGPRA has seen the return of hundreds of thousands of sacred objects, objects of cultural patrimony, and funerary objects to Indians and Indian tribes.²⁶ It has also seen the

16. GULLIFORD, *supra* note 4, at 42.

17. *Id.* at 56.

18. *Id.* at 65–66 (quoting Janine Pease Windy Boy).

19. *United States v. Corrow*, 119 F.3d 796, 798 (10th Cir. 1997).

20. Jori Finkel, *Is Everything Sacred?: A Respected Art Dealer is Busted for Selling a Cheyenne War Bonnet*, LEGAL AFFAIRS, July/Aug. 2003, at 65, 66.

21. GULLIFORD, *supra* note 4, at 64–65.

22. *Id.* at 47.

23. *United States v. Corrow*, 119 F.3d at 799.

24. *Johnson v. Chilkat Indian Vill.*, 457 F. Supp. 384, 386 n.1 (D. Alaska 1978).

25. Finkel, *supra* note 20.

26. *See infra* note 121 and accompanying text.

return of tens of thousands of human remains.²⁷ The Act has placed Indians in control of these items.²⁸ It has led, more often than not, to greater communication and collaboration between museums, scientists, and American Indians, and to a heightened respect for the sanctity of Indian art, cultural property, and human remains.

Despite these successes, persistent challenges remain. While hundreds of thousands of objects of Indian art and cultural property have been affiliated with, and repatriated to, present-day tribes, even more remain unidentified, languishing in the custody of museums and government agencies. These items have been classified as Native American, within the meaning of NAGPRA, but gaps in the evidentiary record so far have prevented their cultural affiliation with one or more present-day tribes. The costs—to tribes, museums, and government agencies—of establishing such affiliations can be exorbitant. Still other items, like the skeletal remains of the 9,000-year-old “Ancient One” known as Kennewick Man, are so old that their mere identification as Native American, not to mention their cultural affiliation with a particular tribe, has been contested.²⁹

The challenges posed by unaffiliated and ancient items lie beyond the boundaries of the national consensus described by Strickland.³⁰ Who should bear the extraordinary costs of establishing the cultural affiliation of presently unaffiliated items held by museums and federal agencies? How much are we willing to spend to ensure—or attempt to ensure—that Indian artifacts, cultural property, and human remains are returned to their rightful owners? To what extent—and to whom—should museums and federal agencies be required to repatriate items that cannot be affiliated with any given tribe?

What disposition should be required—or permitted—for newly discovered artifacts and remains so ancient that they bear no readily apparent affiliation with present-day Indians, let alone a particular tribe? How should the interests of museum curators and scientists in the display and study of these ancient objects and remains be balanced against the interests of Indians seeking their speedy return?

There are no easy answers to these questions—not in NAGPRA and not in our national consciousness. By exploring these questions, this paper examines not only the NAGPRA, its background, and

27. *See id.*

28. *See infra* note 130 and accompanying text.

29. *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004).

30. *See* STRICKLAND, *supra* note 15.

implementation, but also the central problems it leaves unresolved. To that end, the paper sets out in four parts to examine: first, the historical and political events leading to the NAGPRA's adoption;³¹ second, the particulars of the Act;³² third, the Act's success, to date, in securing the repatriation to tribes of hundreds of thousands of Native American cultural items;³³ and finally, the challenges facing Indians, museums, scientists, and others as they confront the vexing questions left unanswered by the Act.³⁴

II. BACKGROUND

NAGPRA was prompted, in large part, by revelations in the late 1980s that federally funded museums and government agencies were in possession of millions of objects of Indian art, cultural property, and human remains, and that most of these objects and remains had been "stolen or improperly acquired."³⁵

The most staggering revelations concerned Indian human remains. In February 1987, the Smithsonian Institution reported to Congress that its collection contained the remains of 18,584 American Indians.³⁶ This disclosure was shocking, but it did not begin to capture the full extent to which the human remains of American Indians had been acquired by non-Indians. Conservative estimates suggest that, by the late 1980s, the remains of some 200,000 American Indians and Alaska Natives were held in museums, agencies, universities, historical societies, and other institutions in the United States and around the world.³⁷ Among the remains were severed skulls,

31. See *infra* Part II.

32. See *infra* Part III.

33. See *infra* Part IV.

34. See *infra* Part V.

35. Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 44-45 (1992). See also *id.* at 39-43.

36. S. REP. NO. 101-473, at 2 (1990), available at <http://rla.unc.edu/saa/repatriation/Legislative/lgm002.html>. This figure includes 14,523 sets of remains from North American Indians and 4,061 Eskimo, Aleut, and Koniag remains. *Id.* Historian Andrew Gulliford notes that "although native peoples represent less than 1 percent of today's American population and were an equally small demographic percentage a century ago, [in 1987] they represented 54.4 percent of the Smithsonian's collection of 34,000 human specimens." GULLIFORD, *supra* note 4, at 22.

37. Michael F. Brown & Margaret M. Bruchac, *NAGPRA from the Middle Distance: Legal Puzzles and Unintended Consequences*, in IMPERIALISM, ART AND RESTITUTION 193, 196 (John Henry Merryman ed., 2006); David J. Harris, *Respect for the Living and Respect for the Dead: Return of Indian and Other Native American Burial Remains*, 39 WASH. U.J. URB. & CONTEMP. L. 195, 195 n.3 (1991).

brains, bones, and other body parts.

Much has been written about the factors contributing to this extraordinary accumulation of Indian remains in non-Indian institutions.³⁸ Several such factors are worthy of brief mention here. First, in the mid-nineteenth century, leading American anthropologists began collecting and studying Indian skulls, intending to establish through cranial measurements the racial inferiority of Indians to whites.³⁹ Not long thereafter, in 1868, the U.S. Surgeon General made the collection and study of Indian remains official federal policy, directing U.S. Army personnel to collect Indian remains for the Army Medical Museum. As a result of this policy, thousands of Indian skulls and other body parts “began making their way from the battlefields of the West into medical collections of the U.S. Army and eventually into the physical anthropological collections of museums.”⁴⁰ Second, under the Antiquities Act of 1906,⁴¹ and later the Archaeological Resources Protection Act of 1979,⁴² Indian remains located on federal lands were classified as federal property and treated as “objects of antiquity” or “archaeological resources.” Federal agencies had broad authority to permit the excavation and removal of these remains, provided that “the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.”⁴³ Finally, competition among America’s museums for Indian remains was intense, leading to the widespread—and often rapacious—collection of Indian skeletons.

Indian skeletons were not the only items coveted by collectors and museums. W. Richard West, Jr., Director of the National Museum

38. *E.g.*, KATHLEEN S. FINE-DARE, *GRAVE INJUSTICE: THE AMERICAN INDIAN REPATRIATION MOVEMENT AND NAGPRA* (Gerald Sider & Kirk Dombrowski eds., University of Nebraska Press 2002); DAVID HURST THOMAS, *SKULL WARS: KENNEWICK MAN, ARCHAEOLOGY, AND THE BATTLE FOR THE AMERICAN IDENTITY* (2000); GULLIFORD, *supra* note 4; ROBERT E. BIEDER, *A BRIEF HISTORICAL SURVEY OF THE EXPLORATION OF AMERICAN INDIAN REMAINS* (1990), *reprinted in Hearings on S. 1021 and S. 1980 Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 2d Sess. 278–363 (May 14, 1990).

39. ROBERT E. BIEDER, *SCIENCE ENCOUNTERS THE INDIAN, 1820–1880* (1986).

40. W. Richard West, Jr., *Repatriation*, in *ENCYCLOPEDIA OF NORTH AMERICAN INDIANS: NATIVE AMERICAN HISTORY, CULTURE, AND LIFE FROM PALEO-INDIANS TO THE PRESENT* 543, 544 (Frederick E. Hoxie ed., 1996).

41. Act of June 8, 1906, ch. 3060, 34 Stat. 225 (codified at 16 U.S.C. §§ 431–433).

42. Pub. L. No. 96-95, 93 Stat. 722 (1979) (codified at 16 U.S.C. § 470aa–mm).

43. 16 U.S.C. § 432 (2006).

of the American Indian and a Southern Cheyenne Indian, reports that by the early twentieth century, millions of Indian cultural objects had been acquired by public and private museums:

Large amounts of native cultural patrimony, often viewed as the last physical vestiges of dead or dying cultures and peoples, began moving into museums through means fair and foul—some of it sold by native people to collectors and much else literally stolen. . . . Thus, by the early twentieth century several large public and private museums, including the Smithsonian Institution's National Museum of Natural History, New York's Heye Foundation Museum of the American Indian and American Museum of Natural History, and the Field Museum in Chicago held collections of native objects that, cumulatively, numbered in the millions.⁴⁴

In a report to Congress in August 1979, the U.S. Department of the Interior described the nature and extent of the problem:

Museum records show that some sacred objects were sold by their original Native owner or owners. In many instances, however, the chain of title does not lead to the original owners. Some religious property left the original ownership during military confrontations, was included in the spoils of war and eventually fell to the control of museums. Also in times past, sacred objects were lost by Native owners as a result of less violent pressures exerted by federally-sponsored missionaries and Indian agents.

. . .

Most sacred objects were stolen from their original owners. In other cases, religious property was converted and sold by Native people who did not have ownership or title to the sacred object.

. . .

Today in many parts of the country, it is common for "po-thunters" to enter Indian and public lands for the purpose of illegally expropriating sacred objects. Interstate trafficking in and exporting of such property flourishes, with some of these sacred objects eventually entering into the possession of museums.⁴⁵

44. West, *supra* note 40, at 544. For a description of the race to collect Indian artifacts in the Northwest, see DOUGLAS COLE, CAPTURED HERITAGE: THE SCRAMBLE FOR NORTHWEST COAST ARTIFACTS (1985).

45. Trope & Echo-Hawk, *supra* note 35, at 44 (quoting SEC'Y OF INTERIOR, FED. AGENCIES TASK FORCE, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT 77 (1979)).

In December 1987, the U.S. General Accounting Office reported that nearly 44,000 of the 136,000 archaeological sites in the Four Corners states of Arizona, Colorado, New Mexico, and Utah had experienced looting of Indian artifacts and cultural property.⁴⁶ Many of the items stolen from these sites commanded high prices on the black market, including, as noted above, \$60,000 to \$70,000 for a single piece of Mimbres pottery.⁴⁷ In Arizona alone, it was determined that, in 1982, “\$2.7 million in artifacts were sold . . . 95% of which had been removed from federal lands.”⁴⁸ It was also estimated that another \$9 million in damage had been done to archaeological sites and cultural artifacts in Arizona in 1982.⁴⁹ These figures were consistent with estimates for the rest of the country.⁵⁰

Existing laws proved inadequate to protect against the theft of Indian artifacts and human remains or to ensure the repatriation of items already seized. For example, while numerous states had laws barring the excavation or disturbance of remains and funerary objects in unmarked graves,⁵¹ these laws were under-enforced. Moreover, less than a handful of states had laws requiring the repatriation of cultural property or remains already excavated or otherwise unlawfully acquired.⁵²

State repatriation laws were passed in response to public displays of Indian artifacts and human remains and mass excavations of Indian burial grounds in the years immediately preceding NAGPRA’s adoption. For example, “[i]n 1989, Hawaii appropriated \$5 million

46. U.S. GEN. ACCOUNTING OFFICE, CULTURAL RESOURCES: PROBLEMS PROTECTING AND PRESERVING FEDERAL ARCHEOLOGICAL RESOURCES No. RCED-88-3, 22 (1987) [hereinafter G.A.O.]. See also H. COMM. ON INTERIOR & INSULAR AFFAIRS, THE DESTRUCTION OF AMERICA’S ARCHAEOLOGICAL HERITAGE: LOOTING AND VANDALISM OF INDIAN ARCHAEOLOGICAL SITES IN THE FOUR CORNERS STATES OF THE SOUTHWEST (Comm. Print No. 6 1988).

47. G.A.O., *supra* note 46, at 29.

48. *Id.* at 101.

49. *Id.*

50. George S. Smith & John E. Ehrenhard, *Introduction* to PROTECTING THE PAST, *supra* note 6.

51. Trope and Echo-Hawk report that, as of 1992, thirty-four states had passed laws protecting unmarked burial sites. Trope & Echo-Hawk, *supra* note 35, at 52 n.79. They note that “[t]hese laws typically prohibit intentional disturbance of unmarked graves, provide guidelines to protect the graves, and mandate disposition of human remains from the graves in a way that guarantees reburial after a study period.” *Id.* at 52.

52. Arizona, Hawaii, Kansas, and Nebraska had enacted repatriation laws prior to NAGPRA’s adoption. *Id.* at 53–54. California adopted similar legislation in 1991. *Id.* at 54.

from its Land Banking Law to purchase a Native Hawaiian burial ground owned by a private developer who had dug up over 900 remains in order to build a hotel—\$500,000 of those funds were used to rebury the dead.”⁵³ Similarly, in 1989, Kansas passed legislation closing the “Indian Burial Pit” near Salina, Kansas, which had publicly displayed the remains and associated funerary objects of 165 Indians.⁵⁴ The Kansas State Historical Society later repatriated the Indian remains in its collection.⁵⁵

These highly publicized events, and others like them, led to a national awareness of the historic and on-going misappropriation of Indian art, cultural property, and human remains and, in turn, to a national consensus that these items ought to be returned to their rightful owners. This consensus was the driving force behind Congress’s enactment of NAGPRA in 1990.

III. NAGPRA

NAGPRA regulates the disposition of Indian cultural property and human remains in at least three distinct ways: first, it provides for the repatriation of cultural property and remains held by federal agencies and federally funded museums;⁵⁶ second, it safeguards the ownership of Indian cultural property and remains that “are excavated [from] or discovered on Federal or tribal lands after November 16, 1990”;⁵⁷ and finally, it restricts the trafficking in Indian cultural property and remains.⁵⁸ Each of these provisions is discussed in turn below.⁵⁹

53. *Id.* at 53.

54. *See id.* *See also* GULLIFORD, *supra* note 4, at 22.

55. *See* Trope & Echo Hawk, *supra* note 35, at 53. During this period, many museums and universities voluntarily repatriated their collections of Indian artifacts and remains. *See* GULLIFORD, *supra* note 4, at 24.

56. 25 U.S.C. § 3005 (2006).

57. *Id.* § 3002(a).

58. 18 U.S.C. § 1170 (2006).

59. For an in-depth treatment of these provisions and their legislative history, see Trope & Echo Hawk, *supra* note 35. NAGPRA is one of many federal statutes designed to protect American Indian cultural resources, including the Antiquities Act of 1906, ch. 3060, § 2, 34 Stat. 225 (1906) (codified at 16 U.S.C. §§ 431–433 (2006)), *amended by* Pub. L. No. 111-84, 123 Stat. 2190 (2009); the Archaeological Resources Protection Act, Pub. L. No. 96-95, 93 Stat. 721 (codified as amended at 16 U.S.C. §§ 470aa–470ll (2006)); the Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4663, 4665 (codified at 18 U.S.C. §§ 1158–1159 (2006)); the Native American Languages Act, Pub. L. No. 101-477, §§ 102–107, 104 Stat. 1153, 1153–56 (codified at 25 U.S.C. §§ 2901–2906 (2006)); the Indian Child Welfare Act of 1978, Pub. L. No.

Before proceeding to that discussion, it is important to identify the categories of Indian “cultural items” to which NAGPRA’s protections pertain. They are:

- Sacred objects. These are defined as “specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.”⁶⁰ These items must have been “devoted to a traditional Native American religious ceremony or ritual” and they must have “religious significance or function in the continued observance or renewal of such ceremony.”⁶¹ Examples of sacred objects include certain ceremonial headdresses, masks and regalia, sacred drums, rattles, altars, staffs, pipes, and medicine bundles.
- Cultural patrimony. This is defined as “an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual.”⁶² Federal regulations identify the Zuni War Gods and Confederacy Wampum Belts of the Iroquois as examples of objects of cultural patrimony.⁶³

Zuni War Gods, hand-carved wooden figurines, are “considered vital to Zuni spiritual health,” and are “communal property not to be displayed, traded, or sold.”⁶⁴ Their proper resting places are the sacred tribal caves and shelters of the Zuni Pueblo; there, they “gradually age and deteriorate, thus reaffirming both the cyclical nature of all

95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1923 (2006)); the American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469 (codified at 42 U.S.C. § 1996 (2006)), to name a few. For in-depth treatments of these laws, see WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* (3d ed. 1998); ROBERT N. CLINTON, CAROLE E. GOLDBERG & REBECCA TSOSIE, *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* (4th ed. 2003); DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* (5th ed. 2005).

60. 25 U.S.C. § 3001(3)(C) (2006).

61. 43 C.F.R. § 10.2(d)(3) (2008). The House Report on NAGPRA made clear that “the definition of ‘sacred objects’ is intended to include both objects needed for ceremonies currently practiced by traditional Native American religious practitioners and objects needed to renew ceremonies that are part of traditional religions.” H.R. REP. NO. 101-877, at 17 (1990).

62. 25 U.S.C. § 3001(3)(D). Cultural patrimony and sacred objects are not mutually exclusive categories. In fact, many items repatriated under NAGPRA have been classified both as objects of cultural patrimony and sacred objects.

63. 43 C.F.R. § 10.2(d)(4).

64. GULLIFORD, *supra* note 4, at 43.

Zuni-made objects and the power of the spirit world.”⁶⁵

Similarly, among the Iroquois Indians of the Northeast, wampum belts “have been long valued as ritual objects of great spiritual significance,” often symbolizing treaties between the tribes and foreign states or nations.⁶⁶ They may be alienated, if at all, by the tribes acting as a whole, not by individual members.

- Associated funerary objects. These are items made exclusively for burial purposes or to contain human remains and such other objects that
 - as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum⁶⁷
- Unassociated funerary objects. These are funerary objects (with the exception of items made exclusively for burial purposes or to contain human remains) where the remains are not also in the possession or control of a federal agency or museum, but the object can be related to specific individuals, families, or known human remains, or to a specific tribal burial site.⁶⁸

Perhaps the best-known examples of native funerary objects are the ceramic vessels of the Mimbres people, who lived in the Southwest approximately 1000 years ago. These “perfectly shaped bowls” were “decorated with detailed, painted geometric or pictorial designs,”⁶⁹ and buried with the dead:

[The Mimbres people] used magical symbols and extraordinarily sophisticated geometric designs to produce perhaps the finest prehistoric ceramic pottery in the United States. The designs on their beautiful bowls and jars give us a vivid, timeless perspective of the Mimbres culture, with realistic images of animals, insects, birds, deer, antelope, mythic creatures, and paintings of the Mimbrenos

65. *Id.* at 44.

66. ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 51-52 (1997).

67. 25 U.S.C. § 3001(3)(A).

68. *Id.* § 3001(3)(B).

69. G.A.O., *supra* note 46, at 12.

themselves. Women potters depicted their people coming from the belly of the earth, gambling for arrows, hunting, fishing, wrestling, making love, and giving birth. Within the span of 150 years, in a burst of inexplicable creativity, the Mimbrenos mastered perspective in a way that would not find its equivalent in Europe until the Renaissance.⁷⁰

- Human remains.⁷¹ These are defined as the “physical remains of the body of a person of Native American ancestry.”⁷²

A. *Repatriation of Cultural Items Held by Federal Agencies and Museums*

NAGPRA requires federal agencies⁷³ and federally funded museums,⁷⁴ to prepare summaries of their holdings or collections of sacred objects, objects of cultural patrimony, and unassociated funerary objects.⁷⁵ These summaries must include:

[A]n estimate of the number of objects in the collection

70. GULLIFORD, *supra* note 4, at 45–47.

71. 25 U.S.C. § 3001(3).

72. 43 C.F.R. § 10.2(d)(1) (2008).

73. The term “federal agency” is defined to include all departments, agencies, and instrumentalities of the United States. 25 U.S.C. § 3001(4).

74. The term “museum” is defined to include all museums, institutions, and state or local government agencies (including institutions of higher learning) that receive federal funds. *Id.* § 3001(8). As a practical matter, NAGPRA applies to “virtually all museums in the United States,” with “the exception of the Smithsonian and museums receiving no federal funds or support.” West, *supra* note 40, at 545. The Smithsonian is subject to separate legislation, the National Museum of the American Indian Act, Pub. L. No. 101-185, 103 Stat. 1336 (1989) (codified at 20 U.S.C. §§ 80q–80q-15 (2006)), which was enacted one year before NAGPRA and which requires the identification and repatriation of Indian human remains and funerary objects. The Act requires the Smithsonian to inventory and identify the origins of Indian human remains and funerary objects under its control, “in consultation and cooperation with traditional Indian religious leaders and government officials of Indian tribes.” 20 U.S.C. § 80q-9(a)(1). If the remains are identified as those of an individual whose identity is known or of an individual whose identity is unknown but who is nonetheless culturally affiliated with a particular Indian tribe, the Smithsonian “upon the request of the descendants of such individual or of the Indian tribe shall expeditiously return such remains (together with any associated funerary objects) to the descendants or tribe, as the case may be.” *Id.* § 80q-9(c). The Act also provides for the return of unassociated funerary objects, if the objects can be identified as coming from a “specific burial site of an individual culturally affiliated with a particular Indian tribe.” *Id.* § 80q-9(d).

75. 25 U.S.C. § 3004(a). These summaries were to be completed within three years of NAGPRA’s adoption. *Id.* § 3004(b)(1)(C). They were also to be “followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders.” *Id.* § 3004(b)(1)(B).

. . . a description of the kinds of objects included; reference to the means, date(s), and location(s) in which the collection . . . was acquired, where readily ascertainable; and information relevant to identifying lineal descendants, if available, and cultural affiliation.⁷⁶

After preparing these summaries, agencies and museums are required to consult with Indian tribes⁷⁷ and traditional religious leaders who are likely to be culturally affiliated with the items.⁷⁸ Upon request, agencies and museums must provide Indian officials with access to records and other information to enable them to determine the “geographic origin, cultural affiliation, and basic facts surrounding the acquisition . . . of objects covered by the summar[ies].”⁷⁹

The Act also requires federal agencies and museums, “in consultation with tribal government . . . officials and traditional religious leaders,”⁸⁰ to prepare item-by-item inventories of all Native American human remains and associated funerary objects within their possession or control and, to the extent possible, identify the Indian tribes with which they are geographically and culturally affiliated.⁸¹ As of September 30, 2008, federal agencies and museums had prepared 1257 inventories and 1065 summaries pursuant to NAGPRA’s mandates.⁸²

NAGPRA requires federal agencies and museums to repatriate those items in its possession or control for which a cultural affiliation with a particular present-day tribe can be established.⁸³ Cultural affiliation is defined in the Act as “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe . . . and an identifiable earlier

76. 43 C.F.R. § 10.8(b).

77. The term “Indian tribe” includes federally-recognized Indian tribes and Alaska Native villages in the United States. 25 U.S.C. § 3001(7). As used in this paper, the term is also meant to include Native Hawaiian organizations, since they enjoy many, if not all, of the same protections and rights under NAGPRA as do federally recognized Indian tribes in the continental United States. *See id.* § 3001(11).

78. 43 C.F.R. § 10.8(d)(1)(ii).

79. *Id.* § 10.8(d)(3).

80. 25 U.S.C. § 3003(b)(1)(A).

81. *Id.* § 3003(a). These inventories were to be completed within five years of NAGPRA’s adoption. *Id.* § 3003(b)(1)(B). Extensions are authorized for museums under certain circumstances. *Id.* § 3003(c).

82. NAT’L PARK SERV., NAT’L NAGPRA FY08 FINAL REP. 3 (2008), *available at* http://www.nps.gov/history/nagpra/DOCUMENTS/NAGPRA_FY08_Final_Report.pdf.

83. 25 U.S.C. § 3005.

group.”⁸⁴

If federal agencies or museums establish the cultural affiliation of Native American cultural items during the process of preparing inventories or summaries of their holdings, they are required to repatriate the items expeditiously, upon the request of the affiliated tribes.⁸⁵ If the agencies and museums cannot establish the cultural affiliation of particular items on their own, they nonetheless must repatriate them, upon request, if the requesting tribes can show by a preponderance of the evidence that they are culturally affiliated with the items.⁸⁶ Cultural affiliation may be established by “geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.”⁸⁷

NAGPRA’s repatriation requirements are subject to certain notable exceptions. First, federal agencies and museums may delay the repatriation of Native American cultural items for up to ninety days when the items are “indispensable for completion of a specific scientific study.”⁸⁸ Second, when more than one tribe can establish a cultural affiliation to a particular item, the federal agency or museum may retain the item until the tribes “agree upon its disposition or the dispute is otherwise resolved.”⁸⁹ Third, agencies and museums need not repatriate sacred objects, objects of cultural patrimony, or unassociated funerary remains if they can prove that they obtained the items lawfully, “with the voluntary consent of an individual or group that had authority of alienation.”⁹⁰

In addition to these exceptions, NAGPRA provides that tribes may elect not to seek the immediate repatriation of items to which they have asserted a successful claim under NAGPRA. According to

84. *Id.* § 3001(2).

85. *Id.* § 3005(a)–(b). In the case of human remains and associated funerary objects, federal agencies and museums may return the items to known lineal descendants of the Native American whose remains are at issue. *Id.* § 3005(a).

86. *Id.* § 3005(a)(4)–(5).

87. *Id.* § 3005(a)(4); Nat’l Park Serv., U.S. Dept. of the Interior, Nat’l NAGPRA, *Determining Cultural Affiliation Within NAGPRA*, http://www.cr.nps.gov/nagpra/TRAINING/Cultural_Affiliation.pdf (last visited Nov. 25, 2009).

88. 25 U.S.C. § 3005(b).

89. *Id.* § 3005(e).

90. *Id.* § 3001(13). See also *id.* § 3005(c) (governing the standard of repatriation). By definition, cultural patrimony can be alienated only by tribal groups, not individual tribal members. *Id.* § 3001(3)(D). In all cases, the determination of whether or not the alienation of Indian cultural items was voluntary, consensual, and authorized ought to be governed by tribal law, not state or federal law. See Trope & Echo-Hawk, *supra* note 35, at 67–68.

historian Andrew Gulliford, “Some tribes prefer that major cultural institutions continue the curation of artifacts or human remains while transferring actual ownership and legal title back to the tribes.”⁹¹ NAGPRA allows tribes to enter into agreements with museums and federal agencies concerning the “disposition of, or control over, items covered by [the Act].”⁹² These agreements may “establish guidelines as to how the museum or agency should ‘handle’ such items.”⁹³ The agreements may also create more complex arrangements providing for “joint stewardship” over cultural items between tribes, museums, and agencies.⁹⁴

Federal agencies and museums are not required to repatriate sacred objects, objects of cultural patrimony, or funerary objects for which no cultural affiliation to a present-day Indian tribe has been established.⁹⁵ Agencies and museums are in possession of hundreds of thousands, if not millions, of such culturally unaffiliated objects.⁹⁶

In the case of culturally unidentifiable human remains in the possession or control of federal agencies or museums, NAGPRA delegates authority to a Review Committee to inventory the remains and recommend “specific actions for developing a process for [their] disposition.”⁹⁷ The Committee issued its recommendations in June 2000,⁹⁸ but the Interior Department has not adopted regulations based on the recommendations.⁹⁹ As of September 30, 2008, the Committee had inventoried the culturally unidentifiable human remains of 118,400 Native Americans.¹⁰⁰

91. GULLIFORD, *supra* note 4, at 43.

92. 25 U.S.C. § 3009(1)(B).

93. Jack F. Trope, *The Native American Graves Protection and Repatriation Act*, in MENDING THE CIRCLE: A NATIVE AMERICAN REPATRIATION GUIDE, *supra* note 7, at 14.

94. See Michael F. Brown, *Exhibiting Indigenous Heritage in the Age of Cultural Property*, in WHOSE CULTURE?: THE PROMISE OF MUSEUMS AND THE DEBATE OVER ANTIQUITIES 151 (James Cuno ed., 2009).

95. See *supra* note 86 and accompanying text.

96. See *infra* notes 136–38 and accompanying text.

97. 25 U.S.C. § 3006(c)(5) (2006).

98. Recommendations Regarding the Disposition of Culturally Unidentifiable Native American Human Remains, 65 Fed. Reg. 36,462 (proposed June 8, 2000).

99. See 43 C.F.R. § 10.11 (2008) (“Disposition of culturally unidentifiable human remains. [Reserved]”). The Interior Department published a proposed rule on October 16, 2007, with a ninety-day comment period. See NAT’L PARK SERV., *supra* note 82, at 15. The comments and future actions are now under review. *Id.*

100. NAT’L PARK SERV., *supra* note 82, at 7.

B. Disposition of Cultural Items Found on Federal or Tribal Land

NAGPRA contains certain protections for Native American cultural items that are excavated or discovered on federal or tribal lands after November 16, 1990.¹⁰¹ First, the Act prohibits the excavation or removal of native cultural items from federal or tribal lands unless the excavation or removal is conducted pursuant to a permit issued under the Archaeological Resources Protection Act¹⁰² and “after consultation with or, in the case of tribal lands, consent of the appropriate . . . Indian tribe.”¹⁰³ When Native American cultural items are inadvertently discovered on federal or tribal lands, the Act requires the person who discovered the items to immediately notify the appropriate federal or tribal authorities and to cease all activity that may harm the items or the land on which they were found.¹⁰⁴

Second, NAGPRA sets forth a system of priorities to determine the ownership and disposition of Native American cultural items excavated or inadvertently discovered on federal or tribal lands after November 16, 1990.¹⁰⁵ In the case of human remains and associated funerary objects, the first priority is given to lineal descendants.¹⁰⁶ A lineal descendant is defined as

an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe . . . or by the common law system of descent to a known Native American individual whose remains [or] funerary objects . . . are being requested¹⁰⁷

When the lineal descendants of human remains or associated funerary objects cannot be determined, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony, ownership is determined as follows:

- Indian tribes own all cultural items excavated or discovered on their tribal land.¹⁰⁸
- In the case of cultural items discovered on federal land,

101. 25 U.S.C. § 3002(a) (2006). The Act defines “tribal lands” to include, among other things, “all lands within the exterior boundaries of any Indian reservation.” *Id.* § 3001(15) (A).

102. *Id.* § 3002(c) (1).

103. *Id.* § 3002(c) (2).

104. *Id.* § 3002(d) (1).

105. *Id.* § 3002(a).

106. *Id.* § 3002(a) (1).

107. Lineal Descent and Cultural Affiliation, 43 C.F.R. § 10.14(b) (2008).

108. 25 U.S.C. § 3002(a) (2) (A).

ownership is given to the Indian tribe that has “the closest cultural affiliation” with the items.¹⁰⁹

- If the cultural affiliation of items discovered on federal land cannot be determined, but the items were discovered on federal land that is recognized by the federal government as the aboriginal land of a particular tribe, then with limited exceptions ownership is in the Indian tribe on whose aboriginal land the items were found.¹¹⁰

The Act contemplates that the disposition of certain cultural items will not be determined by the standards set forth in the Act.¹¹¹

For example, the Act provides little or no guidance regarding the disposition of culturally unaffiliated items found on land that is neither tribal land nor federal land recognized as the aboriginal land of any tribe.¹¹² Congress directed the Secretary of the Interior to develop regulations for the disposition of these and other unclaimed items,¹¹³ but to date the Secretary has issued no such regulations.¹¹⁴

C. *Trafficking*

NAGPRA prohibits the purchase or sale of sacred objects, objects of cultural patrimony, and funerary objects obtained in violation of NAGPRA.¹¹⁵ The Act also prohibits the purchase or sale of Native American human remains¹¹⁶ except those remains that were “excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization.”¹¹⁷ Violators are subject to severe fines and possible imprisonment.¹¹⁸

IV. SUCCESSES

Michael J. Fox, former Director of the Heard Museum in Phoe-

109. *Id.* § 3002(a)(2)(B).

110. *Id.* § 3002(a)(2)(C).

111. *Id.* § 3002.

112. *See id.*

113. *Id.* § 3002(b).

114. *See* Disposition of Unclaimed Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony, 43 C.F.R. § 10.7 (2008).

115. 18 U.S.C. § 1170(b) (2006).

116. *Id.* § 1170(a).

117. 25 U.S.C. § 3001(13) (2006).

118. NAGPRA provides for fines of up to \$100,000 and imprisonment for up to one year for first offenses and fines of up to \$250,000 and imprisonment for up to five years for subsequent offenses. 18 U.S.C. § 1170(a) (2006).

nix, Arizona, described the benefits of repatriation at the time of NAGPRA's adoption.¹¹⁹ The repatriation of American Indian remains and cultural objects, he wrote,

(1) helps to revive cultures; (2) serves to resolve injustices; (3) brings people together; . . . [and] encourages the participation and involvement of Native Americans in our institutions These positive consequences foster a team approach that leads to productive museum and scientific working environments as they celebrate and preserve a cultural heritage.¹²⁰

NAGPRA's first twenty years have seen many, if not most, of these benefits come to fruition. To date, museums and federal agencies have repatriated (or identified for repatriation) the remains of 31,995 American Indians; 669,554 associated funerary objects; 118,227 unassociated funerary objects; and 4629 sacred objects and objects of cultural patrimony.¹²¹ Some of the most notable items returned to Indian tribes include:

- Several Mimbres ceramic vessels found in New Mexico and believed to be interred with human remains between A.D. 1000 and 1150.¹²² Relying principally on tribal oral histories, the Minnesota Indian Affairs Council, which held the vessels, found them to be culturally affiliated with several present-day puebloan tribes in New Mexico and Arizona and allowed for their repatriation.¹²³
- A Zuni War God returned to the Zuni Pueblo in New Mexico by the Peabody Museum at Harvard University.¹²⁴
- Several Iroquois wampum belts, including a mid-eighteenth century belt, known as the Akwesansne Wolf Wampum Belt, which recorded a treaty between the Mohawks and the French.¹²⁵
- Cultural objects and human remains taken as "trophy"

119. Michael J. Fox, *Repatriation: Mutual Benefits for Everyone*, 24 ARIZ. ST. L.J. 7 (1992).

120. *Id.* at 8–9.

121. National NAGPRA Frequently Asked Questions, <http://www.cr.nps.gov/nagpra/FAQ/INDEX.HTM> (last visited Nov. 14, 2009).

122. Notice of Inventory Completion for Native American Human Remains in the Possession of the Minnesota Indian Affairs Council, Bemidji, MN, 67 Fed. Reg. 57,623 (proposed Sept. 11, 2002) (to be codified at 43 C.F.R. pt. 10.9).

123. *Id.*

124. Notice of Intent to Repatriate a Cultural Item in the Possession of the Peabody Museum of Archaeology and Ethnology, 58 Fed. Reg. 13,796 (Mar. 15, 1993).

125. Notice of Intent to Repatriate a Cultural Item: New York State Museum, Albany, NY, 69 Fed. Reg. 42,773 (July 16, 2004).

from the site of the Sand Creek Massacre of 1864 in Colorado,¹²⁶ and sacred objects taken from the site of the Wounded Knee Massacre of 1890 in South Dakota.¹²⁷

- Ceremonial dance headdresses of the Tlingit Indians of the Chilkat Village in Alaska. For the Tlingit, these objects are “regarded as having great significance to the culture and heritage of the Village.”¹²⁸ Tlingit people “treat these objects and the spirits they embody according to established protocols to ensure the spiritual balance and well-being of the group.”¹²⁹

The return of these and other cultural items has encouraged the development of tribal museums and cultural centers. There are now over 150 tribal museums in this country, many of which were created (or substantially enlarged) to receive and care for cultural items repatriated under NAGPRA.¹³⁰ This, in turn, has led to a resurgence of interest in tribal histories and cultures.

NAGPRA has created opportunities for scientists and Indians to share their knowledge and to enrich their various understandings of Indian art, culture, and history. Curator David Bailey of the Museum of Western Colorado describes one such opportunity triggered by his museum’s repatriation of an Apache *Gaan* dancer’s mask to the Mescalero Apache Tribe of New Mexico:

This particular *Gaan* Dancer’s mask is used in the most sacred Apache dance ceremony by the Mescalero crown dancers . . . The dance is the spiritual representation of the spirit world, so it’s really sacred. . . . They’d asked that it be personally delivered so that we could attend their dance and understand the significance of it, and I think that is a great gesture because when you return it, you come to understand the significance of the sacred object from their side.¹³¹

126. Notice of Inventory Completion for Native American Human Remains from Sand Creek, CO in the Possession of the Colorado Historical Society, Denver, CO, 63 Fed. Reg. 39,292 (July 22, 1998) (to be codified at 43 C.F.R. pt. 10.9).

127. Notice of Intent to Repatriate Cultural Items from Shannon County, SD in the Possession of the Wyoming State Museum, Cheyenne, WY, 64 Fed. Reg. 46,719 (Aug. 26, 1999) (to be codified at 43 C.F.R. pt. 10.10(a)(3)).

128. *Johnson v. Chilkat Indian Vill.*, 457 F. Supp. 384, 388 (D. Alaska 1978).

129. Notice of Intent to Repatriate Cultural Items: University of Alaska Museum of the North, Fairbanks, AK, 70 Fed. Reg. 31,531 (June 1, 2005).

130. For an extensive list of tribal museums and cultural centers, see GULLIFORD, *supra* note 4, at app. B. For a discussion of tribal repatriation programs, see Dean B. Suagee, *Building a Tribal Repatriation Program: Options for Exercising Sovereignty*, in MENDING THE CIRCLE: A NATIVE AMERICAN REPATRIATION GUIDE, *supra* note 7, at 29–44.

131. GULLIFORD, *supra* note 4, at 64 (quoting David Bailey).

David Bailey explained that “[o]ther curators seem to believe their job is to fill their museum’s storerooms and lock the door . . . but I would rather have a dialogue and exchange with living Indians to gain their respect and insight into our collections.”¹³² Richard West notes that NAGPRA’s repatriation mandate has led museums to regard Indian cultures as “continuing cultural phenomena” and systematically to include Indian people in “public programming, exhibitions, and basic research.”¹³³

The Act has also encouraged cooperative arrangements between scientists and American Indians. Archaeologist David Hurst Thomas describes the case of the *Tomanowos* meteor, in which the NAGPRA-mandated consultations between the American Museum of Natural History and the Confederated Tribes of the Grand Ronde led to an agreement that accommodated the interests of both the scientists and the Indians to the meteor.¹³⁴ NAGPRA has led scientists to work with tribal officials to develop research plans that balance scientific interests with those of the tribes. These efforts have increased good will between scientists and tribes and led to productive synergies.¹³⁵

V. REMAINING CHALLENGES

Federal agencies, museums, scientists, and Indians face significant challenges as they struggle to determine the ownership and proper disposition under NAGPRA of Indian art, cultural property, and human remains. Perhaps the two biggest challenges concern, first, the repatriation by agencies and museums of Indian cultural items that have not been culturally affiliated with any particular tribe and, second, the disposition by federal agencies of ancient cultural items excavated from or discovered on federal or tribal land after NAGPRA’s adoption. As will be seen, in the absence of additional legislation, the solutions to these challenges must be found, if at all, in the process of consultation, cooperation, and compromise by and among federal agencies, museums, scientists, and Indians.

132. *Id.* at 53 (quoting David Bailey).

133. West, *supra* note 40, at 545.

134. David Hurst Thomas, *Finders Keepers and Deep American History: Some Lessons in Dispute Resolution*, in *IMPERIALISM, ART AND RESTITUTION*, 218, 230–35 (John Henry Merryman, ed., 2006).

135. Dave Schwab, *Continuing Cooperation Between Archaeologists and Native Americans in Montana*, *SOC’Y FOR AM. ARCHAEOLOGY BULL.*, Nov./Dec. 1993, at 5.

A. Unaffiliated Cultural Items

Federal agencies and museums have reported that they are in possession of the human remains of 118,400 American Indians for whom a cultural affiliation to a particular tribe has not been, or in the view of the agencies and museums cannot be, made.¹³⁶ Such agencies and museums have also reported that they are in possession of 828,641 culturally unaffiliated associated funerary objects.¹³⁷

Data are not available for the number of culturally unaffiliated sacred objects, objects of cultural patrimony, and unassociated funerary objects held by federal agencies and museums, but it is reasonable to estimate that the number of such items is in the hundreds of thousands, if not millions.¹³⁸

NAGPRA provides little, if any, guidance as to the proper treatment of these objects. In fact, in the case of human remains, Congress referred the matter to the Review Committee for its recommendations, noting that there was “general disagreement on the proper disposition of such unidentifiable remains. Some believe that they should be left solely to science while others contend that, since they are not identifiable, they would be of little use to science and should be buried and laid to rest.”¹³⁹ The Review Committee took nine years to make its recommendations, which favored a process of further consultations between federal agencies, museums, and Indian tribes to determine “appropriate repatriation solutions” for culturally unidentified remains.¹⁴⁰ The Secretary of the Interior has yet to issue a final rule adopting the Committee’s recommendations.

For the time being, culturally unaffiliated human remains continue to be in the possession and control of agencies and museums. The same is true for unaffiliated sacred objects, cultural patrimony, and funerary objects.

For tribes, the costs of asserting claims to unaffiliated objects and remains are extraordinary. Tribal officials must sort through thousands of inventories and summaries of agency and museum

136. NAT’L PARK SERV., *supra* note 82, at 7.

137. *Id.*

138. The Peabody Museum at Harvard University estimates that it alone holds a couple hundred thousand unaffiliated artifacts. Telephone Interview with Dr. Diana Loren, Curatorial Assoc., Peabody Museum of Archaeology & Ethnology (June 24, 2005).

139. H.R. REP. NO. 101-877, at 16 (1990).

140. Recommendations Regarding the Disposition of Culturally Unidentifiable Native American Human Remains, *supra* note 98, at 36,463.

collections in order to identify items with which they believe they are culturally affiliated.¹⁴¹ Moreover, once tribes identify such items, they must engage in costly consultations and negotiations with agencies and museums to seek the repatriation of the items. If an agency or museum denies a tribal repatriation request, the tribe may ask the Review Committee to consider the case and make findings as to the cultural affiliation and proper disposition of contested items.¹⁴² The federal courts may review adverse decisions of the Review Committee,¹⁴³ but they are instructed to accord considerable deference to the Committee's administrative findings.

While the federal government has allocated funds to assist tribes in the identification and repatriation of Indian cultural items, its appropriations have been insufficient. Between fiscal years 1994 and 2004, the federal government gave approximately \$16.5 million to tribes.¹⁴⁴ When divided between 562 federally recognized Indian tribes,¹⁴⁵ this amount cannot begin to cover the tribes' costs.

Forced to prioritize among competing claims and interests, many tribes have focused their initial attention on the repatriation of human remains and funerary objects, not sacred objects and cultural patrimony.¹⁴⁶ The result is that enormous quantities of Indian sacred objects and cultural patrimony in federal agencies and museums have remained untouched.

For their part, museums also labor under great burdens to conduct tribal consultations and respond to tribal repatriation requests. The Peabody Museum at Harvard University spent \$1 million to replace its computer system and hire eight new staff to assist with its repatriation program.¹⁴⁷ Between 1994 and 2008, the federal government had given a total of roughly \$9.8 million to federally funded museums to assist with their repatriation efforts.¹⁴⁸ These appropriations are woefully inadequate, given that over a thousand museums have identified Indian cultural items within their collec-

141. See *supra* Part III. A. (specifically, see *supra* note 82 and accompanying text).

142. 25 U.S.C. § 3006(c) (3) (2006).

143. *Id.* § 3013.

144. See NAT'L PARK SERV., *supra* note 82, at 10.

145. See Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,328 (July 12, 2002) (listing federally recognized tribes in the continental United States and Alaska).

146. West, *supra* note 40, at 545.

147. GULLIFORD, *supra* note 4, at 43.

148. National Park Service, U.S. Dept. of Interior, *Journeys to Repatriation: 15 Years of NAGPRA Grants [1994-2008]* 8 (2009), available at <http://www.nps.gov/history/nagpra/NAGPRA-GrantsRetroFinal.pdf> (last visited Jan. 2, 2010).

tions.¹⁴⁹

All of this begs several questions: How much are we willing to spend to ensure that Indian cultural items are returned to their rightful owners? What price should we pay to right the historic wrongs done to Indian people, their cultures, and their cultural property? Who should bear the costs? The government? Museums? Tribes? Others? And what if the “rightful owners” of Indian cultural items no longer exist or cannot be determined? If tribes, agencies, and museums are unable—for financial or other reasons—to establish the cultural affiliation of Indian artifacts and cultural property, should the museums and federal agencies nonetheless be required to repatriate the items? If so, can we agree on which Indians, tribes, or other organizations ought to receive them?

Twenty years into NAGPRA’s implementation, we have done little to answer these questions. Without a newly forged consensus of affected agencies, museums, and tribes, these questions will likely remain unanswered for some time to come.

B. Newly-Discovered Cultural Items

By its own terms, NAGPRA applies only to cultural items that can be classified under the Act as “Native American,” meaning “of, or relating to, a tribe, people, or culture that is indigenous to the United States.”¹⁵⁰ NAGPRA provides little guidance on how to determine whether or not newly-discovered human cultural items are Native American. The Act requires a relationship between the items and a present-day indigenous tribe, people, or culture; but it does not specify the nature of that relationship, nor does it specify the kinds of evidence needed to establish the relationship (or the relative weights to be given to different kinds of evidence).¹⁵¹

In many cases, the answer to the question of whether newly-discovered cultural items are Native American will be obvious. The

149. See *supra* note 82 and accompanying text.

150. 25 U.S.C. § 3001(9) (2006). Non-native artifacts and remains found on federal lands are subject to the Archaeological Resources Protection Act, provided they are at least 100 years old. 16 U.S.C. § 470bb(1) (2006). Under ARPA, these items are the property of the federal government, but they may be studied and displayed in museums, universities, and elsewhere. *Id.* § 470bb–cc.

151. See 25 U.S.C. § 3002 (2006); see also *Bonnichsen v. United States*, 367 F.3d 864, 879 (9th Cir. 2004) (“Although NAGPRA does not specify precisely what *kind* of a relationship or precisely *how strong* a relationship ancient human remains must bear to modern Indian groups to qualify as Native American, NAGPRA’s legislative history provides some guidance on what type of relationship may suffice.”).

geographic location of the items, their age, and their characteristics will be sufficient to prove (or disprove) a relationship to modern Indian tribes, peoples, and cultures. In other cases, particularly those involving prehistoric or ancient items, the answers will be much less clear.

In the case of prehistoric cultural items, what relationship to present-day tribes is necessary or sufficient to establish that the items are Native American within the meaning of NAGPRA? Should we presume ancient artifacts and remains to be Native American if they are discovered on the tribal lands of a present-day tribe, or on federal lands within the aboriginal territory of a present-day tribe? NAGPRA uses such categorical geographical rules in determining the cultural affiliation of cultural items already classified as Native American,¹⁵² but not when classifying items as native or non-native in the first instance. Should such geographic relationships be enough? Or should tribes have to show not just that the ancient items were discovered within their aboriginal or present-day territories, but also that the tribes occupied the areas where the remains were discovered at the time the items were created (or the remains interred)? Should we require even more, such as proof of genetic or cultural ties between the items and present-day tribes?

There is no national consensus as to the answers to these questions. Indians, agencies, and scientists remain deeply divided. To illustrate the point, when U.S. Senator John McCain, Chair of the Senate Committee on Indian Affairs, introduced legislation in 2005 that arguably would have classified all prehistoric cultural property and remains found in the United States as “Native American” within the meaning of NAGPRA, he was confronted with fierce opposition from scientists and others and quickly called off congressional hearings on his proposal.¹⁵³

The type of relationship that is required will have a great bearing on the kinds of evidence necessary to prove its existence. In the case of geographic, temporal, and cultural relationships, what weight, if any, is to be given to tribal oral histories and oral traditions? Are such histories and traditions as reliable as scientific evidence? By whose standards are we to answer that question? If genetic relationships are

152. See *supra* notes 108–10 and accompanying text.

153. See John J. Miller, *Bones of Contention: A Bad Bill Would Throttle American Archaeology*, NAT'L REV. ONLINE, Apr. 14, 2005, <http://www.nationalreview.com/miller/miller200504140803.asp> (describing the opposition to Sen. McCain's proposal).

required, how, if at all, can they be established without performing the very studies and destructive tests on the remains that tribes seek to prevent?

Requiring scientific evidence of a genetic or cultural relationship between present-day tribes and ancient items will rule out Indian ownership of most, if not all, ancient items. It seems unlikely that Congress intended such a result. Indeed, when speaking of ancient human remains, the Senate Committee on Indian Affairs reported at the time NAGPRA was passed that it was “aware that it may be extremely difficult, unfair or even impossible in many instances for claimants to show an absolute continuity from present day Indian tribes to older, prehistoric remains without some reasonable gaps in the historic or prehistoric record.”¹⁵⁴ When it came to establishing cultural affiliation, the Committee—and Congress—rejected the need for “scientific certainty,”¹⁵⁵ and instead allowed for the introduction of tribal oral histories, oral traditions, and other forms of evidence.¹⁵⁶

Many scientists, museums, and agencies give substantial weight to native oral histories and traditions. For example, archaeologist James Chatters reports: “Oral history is invaluable as a source for testable hypotheses about latest prehistoric times and as a means for linking fairly recent skeletal remains to specific events and social groups.”¹⁵⁷ Federal agencies and museums have relied on Indian oral histories and traditions to determine the cultural affiliation of cultural property and human remains inventoried under NAGPRA. At least 266 notices of inventory completion and 42 notices of intent to repatriate have relied, in whole or in part, on oral histories and oral traditions in determining the cultural affiliation of Indian cultural items.¹⁵⁸ In some of these cases, the items were many hundreds, and

154. S. REP. NO. 473, at 10 (1990), *available at* <http://rla.unc.edu/saa/repatriation/Legislative/lgm002.html>.

155. *Id.*

156. See 25 U.S.C. § 3005(a)(4) (2006).

157. Interview by ARCHAEOLOGY with James Chatters, archaeologist and author, Archaeological Inst. of Am., *Conversations: Last Word on Kennewick Man?*, ARCHAEOLOGY, Vol. 55, No. 6, Nov./Dec. 2002) [hereinafter Interview with Chatters], *available at* <http://www.archaeology.org/0211/etc/conversations.html>.

158. Both notices of inventory completion and notices of intent to repatriate are published in the Federal Register. Searchable databases of these notices are available at the National NAGPRA website maintained by the U.S. Department of the Interior. National NAGPRA Online Databases, <http://www.cr.nps.gov/nagpra/ONLINEDB/INDEX.HTM> (last visited Jan. 2, 2010).

even thousands, of years old.¹⁵⁹

Yet, the older the cultural items, the more disagreement there is as to the usefulness of oral histories and oral traditions in determining the items' identity. For his part, Chatters believes oral histories become unreliable when passed down through more than one or two dozen generations: "The usefulness of oral history is limited to the most recent times because it can change with each retelling, depending on the social positions of teller and listener, and the political realities and mores of the time."¹⁶⁰

Concerns over the reliability of Indian oral histories and traditions took center stage in the case of the "Ancient One," also known as "Kennewick Man," whose approximately 9,000-year-old skeleton was found on federal land along the Columbia River near Kennewick, Washington.¹⁶¹ Although some would say the remains bear more physical resemblance to present-day Caucasians than Indians,¹⁶² the

159. See Notice of Inventory Completion: Phoebe A. Hearst Museum of Anthropology, University of California, Berkeley, Berkeley, CA, 68 Fed. Reg. 62,321 (Nov. 3, 2003). In one case, the cultural affiliation of human remains found at a site dating to *circa* 1000 B.C. was, in part, "based on oral traditions that place [tribal] ancestors in the region 'since the beginning[.]'" *Id.* Another inventory relied, in part, on tribal oral histories to determine the cultural affiliation of items found at a site believed to be over four thousand years old. Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Control of Franklin Pierce College, Rindge, NH; Manchester Historical Association, Manchester, NH; New Hampshire Division of Historical Resources, Concord, NH; and University of New Hampshire, Durham, NH; and in the Possession of the New Hampshire Division of Historical Resources, Concord, NH, 67 Fed. Reg. 45,536 (July 9, 2002). It is worth noting that various federal courts have relied favorably on Indian oral histories and oral traditions in other contexts. See, e.g., Brief of Amicus Curiae Haudenosaunee Standing Committee on Burial Rules and Regulations in Support of Defendants-Appellants and Defendants-Intervenors-Appellants, *Bonnichsen v. United States*, Nos. 02-35994, 02-35996, 367 F.3d 864 (9th Cir. 2003), 2003 WL 22593879, at 16 n.9 (citing *United States v. Michigan*, 471 F. Supp. 192, 219 (D. Mich. 1979), *remanded*, 623 F.2d 448 (6th Cir. 1980), *remand modified*, 653 F.2d 277 (6th Cir. 1981), *cert. den.*, 454 U.S. 1124 (finding that oral traditions concerning tribe's history constitute "reasonable and credible" evidence)); *Bonnichsen v. United States*, 367 F.3d 864, 881 (9th Cir. 2004); *United States v. Washington*, 384 F. Supp. 312, 379 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. den.*, 423 U.S. 1086 (1976) (finding that oral traditions concerning tribal history and customs constitutes "reasonable and credible factual data" for purposes of determining fishing rights); *Pueblo de Zia v. United States*, 165 Ct. Cl. 501 (1964) (finding that knowledge of the extent of use and occupancy of land claimed by tribe, passed down to witnesses by word of mouth, is entitled to evidentiary weight and cannot be ignored or discarded).

160. Interview with Chatters, *supra* note 157.

161. See *Bonnichsen*, 367 F.3d 864.

162. Timothy Egan, *Old Skull Gets White Looks, Stirring Dispute*, N.Y. TIMES, Apr. 2, 1998, at A12, available at <http://www.nytimes.com/1998/04/02/us/old-skull-gets-white-looks-stirring-dispute.html>.

U.S. Army Corps of Engineers and the Secretary of the Interior determined the remains to be Native American within the meaning of NAGPRA.¹⁶³ They also found the remains to be culturally affiliated with several nearby Indian tribes and ordered them returned to the tribes. The agencies based their decisions principally on oral histories related by the tribes, which suggested the “long-term establishment of the present-day tribes” in the area.¹⁶⁴ These histories, the agencies determined, were sufficient to establish temporal and geographic relationships between the remains and the present-day tribes.

The federal district and appellate courts disagreed, ruling in the case of *Bonnichsen v. United States* that the tribes’ oral histories were inadequate to show a significant relationship with the Ancient One.¹⁶⁵ The courts decided that because the remains of the Ancient One bore “no special and significant genetic or cultural relationship to [any] presently existing indigenous tribe, people, or culture,” they were not Native American and, therefore, not subject to the protections of NAGPRA.¹⁶⁶

The *Bonnichsen* courts found that the approximately 9,000-year period between the life of the Ancient One and the present was “too long a time to bridge merely with evidence of oral traditions.”¹⁶⁷ The Court of Appeals for the Ninth Circuit was particularly critical in its assessment of the tribal oral traditions:

[W]e conclude that [the oral traditions relied upon by the government] are just not specific enough or reliable enough or relevant enough to show a significant relationship of the Tribal Claimants with Kennewick Man. Because oral accounts have been inevitably changed in context of transmission, because the traditions include myths that cannot be considered as if [they were] factual histories, because the value of such accounts is limited by concerns of authenticity, reliability, and accuracy, and because the record as a whole does not show where historical fact ends and mythic tale begins, we do not think that the oral traditions . . . were adequate to show the required significant relationship of the Kennewick Man’s remains to the Tribal Claimants.¹⁶⁸

163. *Bonnichsen v. U.S., Dep’t of Army*, 969 F. Supp. 628, 638 (D. Or. 1997).

164. *Bonnichsen*, 367 F.3d at 881 (quoting expert testimony of Dr. Daniel Boxberger).

165. *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1152–55 (D. Or. 2002), *aff’d*, 367 F.3d 864 (9th Cir. 2004).

166. *Bonnichsen*, 367 F.3d at 879.

167. *Id.* at 882.

168. *Id.* at 881–82.

The Ninth Circuit's criticism of tribal oral traditions seems unduly severe and dismissive. Yet, is it not unreasonable to argue that the courts, and others charged with implementing NAGPRA, must give controlling weight to tribal oral histories and traditions, in the absence of other corroborating evidence, especially when doing so would give Indian tribes ownership and control over one-of-a-kind artifacts and ancient human remains whose scientific study is highly coveted? To do so, some say, would be to send a "subtly implied message . . . that somehow Native Americans own the history of this country."¹⁶⁹ According to Alan Schneider, a lawyer for the scientists in the *Bonnichsen* case: "What's going on here is not a question of whether Native Americans can believe or follow their traditions, but it's a question of whether all of the rest of the country can be required to follow their traditions."¹⁷⁰

The case of the Ancient One is indicative of the kinds of problems presented by all ancient or prehistoric cultural items—be they human remains, artifacts, or objects of art. By leaving unresolved the manner of determining whether such ancient items are Native American, Congress deferred responsibility for finding the middle ground, balancing the interests of scientific discovery and public display with respect for Indian cultures and traditions, to the federal agencies and courts. Their determinations will vary on a case-by-case basis depending on the perceived reliability of the available evidence and depending on the agencies and courts' political will.¹⁷¹ There was no national consensus in 1990 concerning the appropriate disposition of such objects and remains—or the weight to be given to tribal oral traditions—and there is no such consensus today.

VI. CONCLUSION

When Congress enacted NAGPRA in 1990, it responded to a national consensus that present-day Indian tribes—not government agencies, museums, or collectors—should be the keepers of their sacred cultural objects and ancestral remains. Since 1990, hundreds of thousands of objects of Indian art, cultural property, and human

169. THOMAS, *supra* note 38, at 240 (quoting Alan Schneider).

170. *Id.*

171. Artifacts and remains that cannot be identified as Native American are not subject to NAGPRA or its rules concerning tribal ownership. They are instead subject to the Archaeological Resources Protection Act, and nothing on the face of that Act prohibits federal agencies, on a case-by-case basis, from protecting such remains from public display or scientific study. See 25 U.S.C. § 3009(1)(A) (2006).

remains have been returned to their lineal descendants or culturally affiliated tribes under NAGPRA. This is a tremendous accomplishment whose importance cannot be understated. Yet difficult challenges remain for which there is no national consensus. In the case of ancient, unidentified cultural items, the interests of scientists eager to study them crash headlong into those of Indians who claim them as their own and seek their immediate return. Categorical solutions favoring one side over the other are unlikely. Instead, compromises will be required of scientists and Indians alike, and those compromises will be facilitated only by mutual understanding and respect for the interests on all sides.